

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

76-7588

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 76-7588

GAYLE MCQUOID HOLLEY, individually
and on behalf of JAMES MCQUOID,
NORMAN MCQUOID, THOMAS MCQUOID,
DOUGLAS MCQUOID, MICHAEL MCQUOID,
and ADELAINE MCQUOID, her minor
children,

Plaintiff-Appellant,

-vs-

ABE LAVINE, as Commissioner of the
New York State Department of Social
Services, and JAMES REED, as
Commissioner of the Monroe County
Department of Social Services,

Defendants-Appellees.

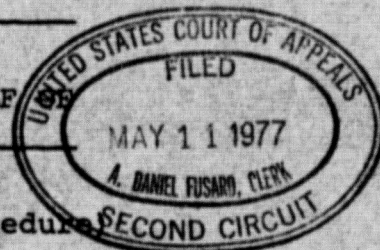
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P/S

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING ON BEHALF
APPELLEE LAVINE

Pursuant to Rule 40
(Federal Rules of Appellate Procedure)



LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee Lavine
The Capitol
Albany, New York 12224
Telephone (518) 474-7178

JEAN M. COON
Assistant Solicitor General

ALAN W. RUBENSTEIN
Principal Attorney

of Counsel

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Grounds for Application for Rehearing

Rehearing is sought on two grounds. First, the Court stated that "[w]e are not supplied with the administrative or legislative background, if any existed, of the quoted regulation [45 C.F.R. § 233.50]" (Slip Opinion, p. 3222). We urge that the brief submitted on behalf of appellee Lavine

supplied such background material. Second, the Court stated that "[s]he [plaintiff Holley] is not one of the hordes who have unlawfully entered surreptitiously" (Slip Opinion, p. 3222). We respectfully urge that the Court overlooked the fact that the October 16, 1974 INS letter (Appendix, p. 13), upon which the Court relied, specifically stated "[h]er last entry was apparently on January 2, 1969, at which time she falsely claimed to be a returning lawful permanent resident of the United States."

ARGUMENT

POINT I

THE ADMINISTRATIVE AND LEGISLATIVE
BACKGROUND OF THE HEW REGULATION (45
C.F.R. § 233.50) DEVELOPED IN APPELLEE
LAVINE'S BRIEF AND APPARENTLY OVERLOOKED
BY THE COURT REQUIRES THE CONCLUSION
THAT PLAINTIFF HOLLEY WAS NOT PERMANENTLY
RESIDING IN THE UNITED STATES UNDER COLOR
OF LAW, CONTRARY TO THE HOLDING OF THE
COURT.

Commencing at page 17 of appellee Lavine's brief we set out the "Background of the HEW regulation and its meaning".

We there referred the Court to the original Notice of Rule Making set forth in 37 Federal Register, page 11977, wherein the proposed HEW regulation would have required the inclusion of all aliens as AFDC recipients.

We also referred the Court to a revised proposed section 233.50 published on June 27, 1973 at 38 Federal Register, page 16911 and to the comments that HEW had received with regard to the earlier proposal including the HEW conclusion that the exclusion of illegal aliens from the SSI program by Congress coincides with the public response that illegal aliens should be excluded from AFDC.

We also referred the Court to the promulgation of 45 C.F.R. § 233.50 on November 2, 1973 at 38 Federal Register, page 30259 wherein HEW again indicated that the exclusion of illegal aliens from AFDC was consistent with congressional action in the SSI program and that the inclusion of illegal aliens was not to be a matter of State option (Br., p. 19).

We then set out the SSI provision (42 U.S.C. § 1382-c[a][1][B]) upon which the HEW regulation appeared to have been based and referred the Court to Senate Report No. 92-1230 for the proposition that the phrase "permanent resident under color of law" referred to a person who entered the United States before July of 1948 and who may be eligible for admission for permanent residence at the discretion of the Attorney General under section 1259 of Title 8 of the United States Code (Br., pp. 19 and 22).

Since the Court narrowed the issue in the case to a construction of the Federal regulation (Slip Opinion, p. 3223) and since the Court's decision construed the regulation without reference to its background, we now urge that the Court reconsider the matter.

POINT II

THE COURT OVERLOOKED THE INS STATEMENT THAT PLAINTIFF HOLLEY ON RETURNING TO THE UNITED STATES IN 1969 HAD FALSELY CLAIMED TO BE A RETURNING LAWFUL PERMANENT RESIDENT OF THE UNITED STATES. THUS, CONTRARY TO THE COURT'S FINDING SHE DID IN FACT UNLAWFULLY ENTER THE UNITED STATES SURREPTITIOUSLY. FURTHER THE INS LETTER WAS NOT AN "OFFICIAL ASSURANCE" TO PLAINTIFF HOLLEY, BUT WAS INSTEAD WRITTEN TO THE CHIEF COUNSEL OF THE MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES.

The Court in setting forth the chronology of plaintiff Holley's residency in the United States (Slip Opinion, p. 3219) has followed substantially paragraph 8 of the complaint, the allegations of which were denied in the answers of both the State and County Commissioners (Appendix, pp. 5, 19, 27).

The INS letter to Mr. Lawrence F. Tranello, Chief Legal Counsel of the Monroe County Department of Social Services (Appendix, p. 13) states:

"The records of this Service indicate Mrs. McQuoid, formerly Miss Dianne Gayle Rivers, was born in Smith Falls, Ontario, Canada, on August 22, 1942. She first entered the United States as a nonimmigrant student on June 30, 1958. Her last entry was apparently on January 2, 1969, at which time she falsely claimed to be a returning lawful permanent resident of the United States."

The fact that Mrs. Holley entered the country in 1969 under false pretenses does not square, we urge, with the Court's conclusion that she is not one of the hordes who have unlawfully entered surreptitiously.

Nor does the record disclose that she has personally any "official assurance" (Slip Opinion, p. 3223) that she will not be deported. The letter of October 16, 1974 presumably would not have been written if Mr. Tranello had not made an inquiry. Thus we urge that plaintiff Holley's situation is not "unusual" and that 45 C.F.R. § 233.50 does not help her in any event.

CONCLUSION

IT IS RESPECTFULLY REQUESTED THAT THE PETITION FOR REHEARING MADE ON BEHALF OF THE APPELLEE STATE COMMISSIONER OF SOCIAL SERVICES BE GRANTED AND THAT UPON REHEARING (1) THE JUDGMENT ENTERED HEREIN ON APRIL 27, 1977 BE VACATED AND THAT JUDGMENT BE ENTERED IN ITS PLACE AND STEAD, AFFIRMING THE ORDER AND JUDGMENT OF THE DISTRICT COURT IN GRANTING SUMMARY JUDGMENT ON BEHALF OF THE STATE COMMISSIONER OF SOCIAL SERVICES, AND (2) THAT APPELLEE STATE COMMISSIONER OF SOCIAL SERVICES (PETITIONER HEREIN) HAVE SUCH OTHER, FURTHER AND DIFFERENT RELIEF AS TO THE COURT MAY SEEM JUST AND PROPER.

Dated: May 9, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee Lavine
The Capitol
Albany, New York 12224
Telephone (518) 474-7178

JEAN M. COON
Assistant Solicitor General

ALAN W. RUBENSTEIN
Principal Attorney

of Counsel

AFFIDAVIT OF SERVICE

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-against-

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REED, as Commissioner of Monroe County
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Defendants-Appellees.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Carol Coonradt, being duly sworn, says:

I am over eighteen years of age and a Stenographer
in the office of the Attorney General of the State of New York, attorney
for the Defendants-Appellees herein.

On the 9th day of May 1977 I served
the annexed Petition for Rehearing on Behalf of Appellee upon the
Lavine
attorney^s named below, by depositing 2 cop^{ies} thereof,
properly enclosed in a sealed, postpaid wrapper, in the letter box
of the Capitol Station post office in the City of Albany, New York,
a depository under the exclusive care and custody of the United States
Post Office Department, directed to the said attorney^s at the
address es within the State respectively theretofore designated by
them for that purpose as follows:

K. Wade Eaton, Esq.
Greater Up-State Law Project
80 West Main Street
Rochester, New York 14614

Charles G. Porreca
111 Westfall Road
Rochester, New York 14620

Carol Coonradt.

Sworn to before me this

9th day of May 1977

Ralph D. Camardo

RALPH D. CAMARDO
Notary Public, State of New York
No. 4618149
Qualified in Albany County
Commission Expires March 30, 1979